No. 02-722

Supreme Court, U.S.
FILED
MAR 26 2003
CLERK

In The
Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *ET AL.*,

Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF BET TZEDEK LEGAL SERVICES AND SIMON WIESENTHAL CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

With the consent of the parties pursuant to Rule 37 of the Rules of this Court, Bet Tzedek Legal Services ("Bet Tzedek") and the Simon Wiesenthal Center ("Wiesenthal Center") submit this brief as *amici curiae* in support of Respondent John Garamendi, Commissioner of Insurance for the State of California.[1]

Bet Tzedek, "The House of Justice," is a non-profit legal services agency that, since 1974, has been providing free and compassionate legal representation to thousands of low-income residents throughout Southern California. Bet Tzedek provides these services to clients of all racial, religious and ethnic backgrounds. It is also, perhaps, the only organization in the United States regularly representing Holocaust survivors, free of charge, in their efforts to secure reparations for the horrors endured during the World War II era. Over the past several years, Bet Tzedek has represented more than 800 Holocaust survivor clients, all of whom are elderly and poor. Bet Tzedek has assisted these Holocaust survivors in their efforts to assert claims under German-based reparations programs, United States-based litigation, and other humanitarian relief programs administered by various international funds or governments.

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[1] Copies of the parties' letters of consent are filed herewith. Pursuant to Rule 37.6, counsel for Bet Tzedek and the Wiesenthal Center certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than they or their counsel has made a monetary contribution to this brief's preparation or submission.

Bet Tzedek has an interest in this case because many of its Holocaust survivor clients have either made claims, or are contemplating filing claims, in various fora, including the International Commission on Holocaust-era Insurance Claims, for payment of insurance benefits due under life and other insurance policies purchased by members of their families prior to the outbreak of World War II. These policies were purchased from, among others, Petitioner insurance companies or their affiliates. The Nazi regime stripped the possessions from the survivors, who therefore have no copies of their insurance policies. Only the insurance companies can be expected to have maintained these records. California's Holocaust Victims Insurance Relief Act of 1999 ("HVIRA"), found at California Insurance Code § 13804, seeks to require insurance companies doing business in California to disclose vital information concerning these policies. Bet Tzedek's clients are interested in accessing this information, through California's reporting statute, so that they may learn their ancestral history and, in an appropriate forum, pursue their claims.

The Wiesenthal Center was founded in 1977 and named after the world famous Nazi hunter Simon Wiesenthal. In its relatively short existence, the Wiesenthal Center has represented the interests of its more than 400,000 family unit members in a variety of human rights concerns and has, through its activism, represented the interests of Holocaust survivors worldwide. From Argentina to Ukraine and every country in between, the Wiesenthal Center has been at the forefront of meeting the needs of survivors. It has engaged in political dialogue with world governmental and spiritual leaders and has engaged in lawsuits on behalf of its members. Throughout its history, the Wiesenthal Center has sought to apply the

lessons of the Holocaust to contemporary social problems. It has created a Museum of Tolerance on its Los Angeles campus that has attracted tens of thousands of visitors, including many school children. It has sponsored many educational endeavors, including films and speakers, to promote education and tolerance in this country and throughout the world. The family members of the Wiesenthal Center number survivors in the tens of thousands. Like Bet Tzedek's clients, the family members of the Wiesenthal Center are interested in accessing the information called for by HVIRA both to learn their family histories and, in an appropriate forum, to pursue their claims.

Holocaust survivors, their heirs and all Californians, as consumers of insurance industry products, may also utilize the disclosures HVIRA requires to make wise and moral purchasing decisions. Thus, Bet Tzedek and the Wiesenthal Center's *amici curiae* brief addresses three discrete issues:

1. The essential role HVIRA plays in protecting Californians;
2. The significance of the beneficiaries' residences in California in establishing that California's contacts are sufficient to enact HVIRA; and
3. The scope of HVIRA's reporting requirements.

SUMMARY OF THE ARGUMENT

The unspeakable horrors of the Holocaust are well known. Some 11 million human beings were murdered in the Nazi death factories, euphemistically referred to as "concentration camps." Six million Jews, one million of whom were children, were exterminated. Over one-third of

world Jewry, and some 60% of European Jewry, was slaughtered. Along with them, also murdered, were Catholics, Gypsies, Slavs, Poles, homosexuals, and others deemed not worthy of life.

But the Nazi butchery of innocents was about more than the extirpation of people deemed to be inferior or inimical to the master race. It was also about the theft, on an unimaginable scale, of the assets of those human beings whom it destroyed. The profit from the bodies of the murdered – gold fillings and human skin – are but small pickings compared to the profit from their looted property: real estate, bank accounts, artworks, investments. Some of this was stolen by governments, but more of it was stolen by entities and persons who sought to profit from Nazi persecutions. And as the Nazis killed with a modicum of secrecy, so did those who sought to profit steal in secret.

As for murder, that modicum of secrecy permitted whole populations, as well as the world-at-large, to avert their gaze. But as for theft, secrecy also had a profit motive. And while, with the war's conclusion, the quasi-secrecy of the death factories came to an end, the secrecy shrouding the ghoulish profit by fellow citizens and European enterprises only increased.

That secrecy, which insurance companies that sold policies to Europeans between 1920 and 1945 are in the forefront of maintaining, is more than an assault on the assets of today's rightful owners. Perhaps more importantly, it is an assault on memory and on love. It is in a real sense a continuation of what the Nazis perpetrated because it treats the people who were murdered, and those whom they loved and sought to protect, as less than human, rightly humiliated and without the basic rights of

property and access to one's own history that most of us take for granted.

Petitioners insensitively, and wrongly, portray these matters as simply irrelevant to California – long distant in the past, involving events far away and people whose lives have no connection to the State. But this is not so. All Californians have an interest in knowing with whom they are doing business: whether those entities that choose to do business in California are honest, economically reliable and socially responsible. One might argue at length whether to conduct business with those who long ago profited off the horrors of decimated peoples, from car manufacturers to pharmaceutical makers. But the argument ceases to be theoretical when even today the profit from the theft continues, and the secrecy is maintained, while those who would seek to learn the truth are willfully humiliated so that the profiteers might gain the trust and confidence of contemporary Californians from whom they seek to profit. Callous insurance companies that profited from the Holocaust need secrecy not only to keep the properties that they stole from corpses, but to continue to do business today with Californians who would be rightly concerned, for both economic and moral reasons, if they learned the truth.

But California has another equally compelling interest here. Petitioners cast their argument in terms of insurance sold in Europe to European policyholders for European beneficiaries – as if no one ever purchased policies from insurance companies that did business in California before 1945, as if no one ever traveled to California before 1945, and as if no Europeans had relatives living in California who they designated as beneficiaries before 1945. How do Petitioners know that no beneficiary

of any policy ever lived in California?[2] Was California free of Jews, and Slavs, and Gypsies, and homosexuals before 1945? Cannot California's legislature rightly assume that *some* policies were entered into by persons who transacted with companies doing business in California, or entered into by persons traveling in California, or for the benefit of persons then residing in California?

Finally, there is another group of Californians, the group that Petitioners do recognize. These are survivors who came here after World War II. These survivors were not omniscient; they did not come to take advantage of non-existent California laws that might someday be enacted, in part, to help them learn the truth. They came to a free country to work, to live, and to rebuild families out of the ashes of death. But their lives do not commence on the date of their arrival. California has an interest in these persons as well – a moral interest and an economic interest. The moral interest is that their memories, and the memories of those who sought to provide for them, be honored with knowledge. The economic interest is that they not be charges of the state, but have knowledge of that which is rightfully theirs so that they may, in an appropriate forum, seek its recovery.

California's HVIRA seeks to break the silence of insurance companies that do business in California. Under HVIRA, the price of doing business in California includes

[2] In this *amici curiae* brief, "beneficiary" refers to any person covered under HVIRA. *See* Cal. Ins. Code § 790.15(b)(1)-(2) (Deering 2003) ("beneficiary means any person or entity entitled to recover under any policy of insurance, including any named beneficiary, any heir of a named beneficiary, and any other person entitled to recover under the policy.").

disclosing the truth. As the Ninth Circuit has held, HVIRA, in furtherance of this goal, is constitutional.

This case is scheduled to be argued in this High Court on April 23, 2003, corresponding in the Jewish calendar to the twenty-first day of the month of Nissan, which is the seventh day of Passover, a holiday celebrating both Jewish freedom from biblical slavery and universal freedom from that which enslaves all people in every era. The Nazi death factories were an obvious form of slavery. But so is ignorance and despair. This case offers this Court the opportunity to bring freedom by shining the light of knowledge into a still-dark corner of the Holocaust – so that consumers can make moral purchasing decisions, so that the humiliated might have an opportunity for a just economic recovery, and so that the despair of injustice might be replaced by the knowledge that mothers and fathers and brothers and sisters cared enough to try to provide for loved ones even during the darkest days of modern European history.

ARGUMENT

I. CALIFORNIA'S HOLOCAUST VICTIM INSURANCE RELIEF ACT IS ESSENTIAL TO PROTECT CALIFORNIANS

A. The Insurance Companies Have Long Thwarted Beneficiaries' Search For Information.

In enacting HVIRA, the California legislature responded to the needs of its citizens for the information they might desire for multiple purposes: to cobble together life stories, to provide survivors and their descendants with monies rightfully theirs, and to protect consumers in their efforts to make informed purchasing decisions. Thus,

HVIRA requires that insurance carriers that choose to conduct business in California and that sold Holocaust-era policies themselves, or through affiliates, report to the Insurance Commissioner, concerning themselves and those companies to whom they are related: the number of policies that were in effect between 1920 and 1945 in Nazi-occupied Europe, the name of the holder and beneficiary of each policy and its current status, information about the place of domicile of the policyholder, whether the policy has been paid, whether diligence has been used to identify beneficiaries, and whether unclaimed funds have been distributed to charitable organizations. Cal. Ins. Code § 13804(a, b) (Deering 2003).

This information is rationally related to the purposes underlying HVIRA. *See Board of Trustees v. Garrett*, 531 U.S. 356, 367 (2001) ("The State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'"); *Dittman v. State of California*, 191 F.3d 1020, 1031 (9th Cir. 1999) (quoting *Halverson v. Skagit County*, 426 F.3d 1257 (9th Cir. 1994) ("We do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did.")).

Most victims of the Holocaust had no means to maintain personal records, or to communicate concerning their financial arrangements in such a way as might assure that their information would survive. Declaration of David A. Lash, Executive Director of Bet Tzedek, submitted on May 15, 2000, as Exhibit A to the Brief of Amicus Curiae Bet Tzedek Legal Services to the United States District

Court for the Eastern District of California ("Lash Decl."), ¶ 8. When the Allied forces liberated the death camps, the few who survived began the agonizing search for those they loved: children, parents, brothers, sisters. Any shred of information was prized. But the Nazis and their accomplices left little in plain view. Not only were the human beings who had been exterminated often simply scattered ash, but the records of their dealings, and their provisions for their loved ones, were often destroyed as well. For those who survived, or who are descended from those who survived, the search for knowledge continues to this day.

Because the insurance companies that profited from the Holocaust are known to have maintained their *own* records, the darkened storage facilities of these companies have seemed a worthwhile place to search. Many victims of the Holocaust are likely to have purchased such life, property and other possibly applicable policies prior to the war. Left without records, family members have only anecdotal stories upon which to rely, while the insurance companies hold the keys to the truth and to a potential reservoir of information not otherwise available. The policies secreted away in these dark vaults provide valuable information about victims of the Holocaust, such as their full names, where and when they were born, their health, where they lived, their property, and the names of their relatives. *See e.g.*, Policy Nos. 55283 and 11528 (Joint Appendix ("J.A.") at 72-80). These bits of information are precious to those without a past, not only because people crave roots, but also because the policies may contain detailed information concerning looted art works, other personal property, or even real estate.

But the policies, of course, represent more than information. The life policies are a testament that one's

parents or grandparents cared; the property policies that families were concerned about assuring their financial well-being. And, of course, the policies are the legitimate contractual obligations of the companies that issued them. In the words of Representative Henry A. Waxman:

> Insurance companies holding Holocaust-era policies have a *responsibility* to disclose any information that will help survivors finally reclaim their policies with dignity and equity. In many cases, company archives contain the only existing files related to the countless policies that were stolen from victims of Nazi ghettos and death camps. . . . Insurance companies must be held accountable.

147 *Cong. Rec.* E1507 (daily ed. Aug. 02, 2001) (statement of Hon. Waxman) (emphasis added); *see also* 145 *Cong. Rec.* H9254 (daily ed. Oct. 4, 1999) (statement of Sen. Lazio) ("We know that insurance companies failed to honor policies held by Holocaust victims" and such contemptible practice "demands a full investigation.").

It is unfortunately not surprising that insurance companies that profited from the Holocaust have largely refused to cooperate with anyone who would benefit from the information they have hidden. Rather, the insurance companies have brutally rebuffed and humiliated the Holocaust survivors and their descendants who have attempted to learn the truth. Take the case of one Bet Tzedek client. His father told him in the transport on the way to Auschwitz that he should always remember, in case he survived, that his family had bought life insurance policies. His father said, remember the insurance company "Generali, like the general, remember Generali." Lash Decl., ¶ 9. The son survived; his family, including his father, was murdered at Auschwitz. When the son sought

to follow up on his father's wish and instruction, Generali frustrated him at every turn. First, he was told to wait. *Id.*, ¶ 9. Later, he was told that he had waited too long to make any claim on the policies. *Id.*, ¶ 9. Then he was told the information was in Italy, but that turned out to be untrue. *Id.*, ¶ 9. Next, he was sent to Czechoslovakia, which also proved fruitless. *Id.*, ¶ 9. Another Bet Tzedek client was physically thrown out of an insurance company's offices for simply trying to find out if his policy could be traced. *Id.*, ¶ 9.

Other Bet Tzedek clients have experienced a classic "gotcha" employed by life insurance companies: insurance companies refuse to process any life insurance policies without a death certificate. *Id.*, ¶ 9. Obviously, in his Nazi death factories, Adolf Hitler did not issue death certificates. Some insurance companies perversely excuse their refusal to pay claims on Holocaust-era policies by arguing that the policies lapsed for non-payment of premiums when the insureds were herded into ghettos or transported to death camps where, plainly, they were not able to make premium payments. *The Status of Insurance Restitution for Holocaust Victims And Their Heirs: Committee On Government Reform*, 107th Cong. 17 (Nov. 8, 2001) (statement of Rep. Mark Foley) ("Mr. Falk tried repeatedly to get Winterthur [insurance company] to honor his mother's policy. The company stiffly refused for years, using all of the same excuses: There is no death certificate; you don't have a copy of the policy; even if the policy is or if there was a policy, it lapsed because your loved one stopped paying premiums during the Nazi period.").

Nor have institutional efforts produced better results. The International Commission on Holocaust-Era Insurance Claims ("ICHEIC"), designed to be a non-adversarial

alternative to obtaining insurance policy proceeds, has been derided as doing "a poor job" of locating and paying insurance policies. Stefan A. Riesenfeld, *Symposium 2001: The Holocaust Restitution Movement in Comparative Perspective*, 20 Berkeley J. Int'l L. 11, 21 (2002). This evaluation seems mild: in its first year of operation, the ICHEIC distributed only $3 million to claimants, but spent $30 million in expenses, which included lavish business trips and generous salaries. *Id.*; Greg Garland, *Agency Turmoil Hinders Claims From Holocaust*, The Baltimore Sun, July 7, 2002, at 1A. ICHEIC's failure was not accidental – the insurance companies willfully dragged out the claims settlement process "in order to avoid having to publish lists of possible dormant Holocaust era insurance policies and to enter into settlements which do not accurately reflect the amounts they owe on the dormant Holocaust era insurance policies." Riesenfeld, *supra*, at 22. As of 2001, Allianz AG, the largest German insurance company and a member of ICHEIC, provided only 380 names out of a list of 1.5 million. Henry Weinstein, *Holocaust Claims Still Going Unpaid*, Los Angeles Times, July 9, 2001, at A1; *see also The Holocaust Endures*, The Baltimore Sun, July 14, 2002, at 4F ("European insurers funding ICHEIC . . . have refused to publish complete lists of policyholders from 1930 to 1945."). These lists were to have contained much of the same information now required to be published under HVIRA.

By dragging out the claims settlement process and making it impossible for beneficiaries to identify the responsible company, insurance companies have effectively used ICHEIC to thwart payment on their policies with the motive of burying the claims along with the last generation of

Holocaust survivors. 147 *Cong. Rec.* E1507 (daily ed. Aug. 2, 2001). Not surprisingly, several of the insurance companies unwilling to publish names of insureds in connection with ICHEIC requirements are now contesting HVIRA's reporting requirements in this lawsuit. HVIRA will help California descendants of Holocaust victims identify the insurance company currently responsible on their policies and will, among other matters, facilitate claims being made through ICHEIC. Cal. Ins. Code § 13802 (Deering 2003) ("This chapter is necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process" now being conducted "through the International Commission on Holocaust-Era Insurance Claims.").

The need to disclose Holocaust-era insurance policy information becomes increasingly important as ICHEIC's deadline for submitting claims on these policies, now set for September 30, 2003, draws closer. Press Release, The International Commission On Holocaust-Era Insurance Claims Announces Extension Of Claims Filing Deadline (March 14, 2003) (contact 202-289-4100). *See also* 147 *Cong. Rec.* E1507 (daily ed. Aug. 02, 2001) (statement of Hon. Waxman) ("Although the ICHEIC was established in 1998 to expeditiously resolve unpaid Holocaust-Era claims . . . inquiries filed remain unresolved because the claimants cannot identify the company holding their assets. Furthermore, regardless of their level of compliance with ICHEIC rules insurance companies . . . are given . . . an arbitrary . . . expiration of their obligation to accept claims.").

The proceeds collected by Holocaust survivors may help defray welfare and related costs that the state would otherwise have to pay. *Allstate Ins. Co. v. Hague*, 449 U.S.

302, 319 (1981) (recognizing that Minnesota has interest in ensuring recovery on insurance policy by beneficiary who moved to Minnesota after "occurrence" under policy because "full compensation for 'resident accident victims' . . . keep[s] them 'off welfare rolls' and able 'to meet financial obligations'."); *Alaska Packers Ass'n v. Industrial Accident Comm'n of Cal.*, 294 U.S. 532 (1935) (upholding the application of California workers' compensation law, despite contract term providing for Alaska law, because California had a legitimate public interest in regulating employer-employee relationships). The average age of a Holocaust survivor is more than 70 years. Declaration of Arthur P. Stern ("Stern Decl.") (J.A. at 30), ¶ 7. Many of those survivors, like the 800 represented by Bet Tzedek, are infirm and living below the poverty level. Lash Decl., ¶ 6. Proceeds from their insurance policies, in whatever forum recovered, can ease the pain of poverty and sickness for these victims, reduce California's welfare costs, and make a significant difference during the last few years of the lives of Holocaust survivors.

For the survivors, time is running out. This generation is the last to witness those who endured the Holocaust firsthand. For these people, there can be no greater example of the truism that "justice delayed is, in fact, justice denied." 145 *Cong. Rec.* H9254 (daily ed. Oct. 4, 1999) (statement of Sen. Lazio).

B. HVIRA Provides All Californians With Information About Unscrupulous Insurance Companies Conducting Business In California.

In this age of information, consumers increasingly make purchasing decisions on the basis of social policy

factors in addition to economics. Products, such as apparel, may be rejected because of associated labor practices. Fast-food may not be purchased because of environmental concerns. And the stock of companies that make cigarettes, or promote baby formula in third world countries, may suffer in the marketplace. These are legitimate concerns of a socially conscious consumer, who may rightly look to state government to gather and make public the information necessary to make an informed purchasing decision.

Of course, the integrity of the seller is even more important in the insurance industry. Each purchase (or rejection) of an item of clothing is an infinitesimal economic transaction, and the quality of the apparel is unlikely to be affected by the standard of living of the worker who produced it. Similarly, whether fast-food establishments use excessive paper (or misuse Styrofoam) for packaging will have no impact on the quality of the meal. But insurance is very different. The present willingness of an insurance company, or those with whom it voluntarily chooses to be affiliated, to conceal information about its policies in order to avoid payment may reasonably be seen as a fair indicator of how that company will treat a new purchaser. California consumers deserve to know this information, and HVIRA is rightly designed to provide it. *See Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832, 847 (9th Cir. 2002) ("We agree with the Commissioner that the suggested defenses would hamper the state's ability to provide information to Holocaust victims and their families about potentially valid claims, *to protect California citizens from insurance companies that have a history of refusing to pay valid claims or of refusing to inform potential beneficiaries about policy proceeds to which they may be entitled, and to inform California citizens about the character of the family of*

insurance companies from which they are contemplating buying insurance.") (emphasis added).

For all Californians, HVIRA will provide information that will permit informed and moral purchasing decisions. The state can serve no nobler purpose than providing for its citizens the ability to make moral choices, to support themselves economically, and to know the truth. As the United States Congress itself has stated, "'those who cannot remember the past are condemned to repeat it.' But the truth must be established before it can be remembered." 145 *Cong. Rec.* H9254 (daily ed. Oct. 4, 1999) (statement of Hon. LaFalce) (quoting poet and philosopher George Santayana).

II. CALIFORNIA'S CONTACTS WITH THE PARTIES AND THE UNDERLYING POLICIES ARE SUFFICIENT TO SATISFY DUE PROCESS

Petitioners argue that HVIRA violates the Due Process Clause of the United States Constitution because it applies substantive law to a situation with which California has insufficient contacts. Petitioners' Brief at 43. Yet as the Ninth Circuit correctly held, HVIRA does not regulate the substance of out-of-state insurance polices. *Gerling*, 296 F.3d at 842 ("HVIRA's reporting provisions do not seek to regulate the substance of out-of-state transactions. . . . To the contrary, HVIRA requires California insurers only to disclose information about their foreign transactions or those of their affiliates."). Contrary to Petitioners' argument, California's contacts with the parties and the underlying policies are sufficient to satisfy due process.

A. The Beneficiaries' Relocation To And Continued Residence In California Provide California Sufficient Contacts To Enact HVIRA.

Petitioners argue that the beneficiaries' "post-transaction change of residence does not justify" California's enacting HVIRA. Petitioners' Brief at 46. This is an odd argument because the issue here is not whether a particular plaintiff has sufficient contacts with California to invoke California law, but rather whether California has sufficient interest to enact its reporting statute. The beneficiaries' residence in California is a bona fide and significant contact that permits California to enact HVIRA.[3]

None of Petitioners' cases, cited in Petitioners' Brief at 44-45, is relevant here. In *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), plaintiff brought suit to enforce payment on a fire policy where the policy was entered into in Mexico, the policy specifically provided coverage only in

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[3] Petitioners characterize "at least 5,600 documented Holocaust survivors" as a "small number of Holocaust survivors (or their heirs)" in California "decades after the events in question." Petitioners' Brief at 46. Having dragged out for more than half a century any recovery by refusing, at every turn, beneficiaries' claims, Petitioners and other insurance companies have themselves created today's demographics. *The Status of Insurance Restitution For Holocaust Victims And Their Heirs: Committee On Government Reform*, 107th Cong. 27 (Nov. 8, 2001) (statement of Rep. Ben Gilman) ("[M]any Holocaust survivors and their heirs contacted . . . insurance institutions to seek compensation on their claims but were turned away due to a lack of documentation."). The average age of Holocaust survivors is 70 years. Stern Decl. (J.A. at 30), ¶ 7. Had Petitioners not been so successful in delaying consideration of Holocaust-era claims, far more beneficiaries would be alive today to be directly benefited by this information.

Mexico, the premium was paid in Mexico, the policy specified payment in Mexico, and the policyholder lived in Mexico (although he had a residence in Texas) both when the policy was issued and after the loss. 281 U.S. at 403-404, 407-408. In these circumstances, this Court held that the plaintiff could not invoke Texas law. *Id.* at 408. In *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), an employee fraud policy was purchased in Tennessee by a Tennessee policyholder from a Tennessee insurer. An employee committed fraud in Mississippi. Since Tennessee law, however, barred recovery under the policy because notice to the insurer had not been timely given, the Tennessee insured brought suit in Mississippi, where recovery was permitted. This Court held that, in these circumstances, Mississippi law was improperly applied. *Id.* at 145-146.

Similarly, Petitioners cite *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), for the proposition that "a party's post-transaction change of residence does not justify a forum state's exercise of legislative jurisdiction over a foreign transaction." Petitioners' Brief at 16. But *Phillips* has nothing to do with a post-transaction change of residence. All *Phillips* holds is that, in the context of a class action brought to recover interest payments on behalf of plaintiffs residing (and acting) "in all 50 states, the District of Columbia and several foreign countries" (*id.* at 799), a Kansas court could not *ipse dixit* simply apply Kansas law to every transaction.[4]

[4] Petitioners' *Amici* Mitsubishi Materials Corporation, *et al.* adds to these citations the case of *Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178 (1936). Motion Of Mitsubishi Materials Corporation, et al., For Leave To File And Brief Amici Curiae In Support Of Petitioners at 24

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None of these cases has any application here. The present case has nothing to do with whether a particular Holocaust survivor, or a particular transaction, has sufficient contact with California to justify the application of California law. Nor is any Holocaust survivor seeking to sue in California. To the contrary, the present case raises *only* the issue as to whether California has sufficient interest to legislate certain reporting requirements. The continued residence in California of Holocaust survivors, whenever they came, provides California with sufficient contacts to enact HVIRA. Petitioners' cases simply do not speak to this issue.

Petitioners may be intending to argue by analogy that if a plaintiff cannot change his or her residence to take advantage of a different state's law, then a state cannot enact laws based on its interests in, and the interests of, persons who changed their residences after the events in question to become residents of the state. But the analogy is wrong. A state has an interest in the welfare of its residents and citizens.[5] The state's interests are not a

n.20. There, a policy beneficiary sued in Georgia, where she had moved after her husband's death, on her husband's life insurance policy. The deceased husband had applied for and received the policy in New York, where he had lived with his wife until his death. *Id.* at 179. Because the husband had materially misrepresented his health when he applied for the policy, New York law precluded any payment. Georgia had no such statute. *Id.* at 180. Rejecting the widow's attempt to apply Georgia law, this Court held that New York law applied to the misrepresentations made by the husband while he was living in New York. *Id.* at 182-183.

[5] In *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954), this Court held that a non-Louisiana insurance company that issued an insurance policy in Massachusetts and delivered it to an Illinois manufacturer in Massachusetts and Illinois was subject to direct suit by a consumer residing in Louisiana. The Court reasoned

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function of the length of time of domicile. Moreover, a state's interest in enacting legislation to protect current residents is very different from a person coming to the state, for the purpose of forum shopping, to take advantage of already-enacted legislation. Furthermore, the Holocaust survivors moved to California *before* HVIRA was enacted, and without any intention of being the beneficiaries of such legislation.[6]

Moreover, in many instances, Petitioners' affirmative acts of concealment have been perpetrated against California citizens in California. One California resident, Alexander Weiss, remembers that his father bought insurance policies in anticipation of the Nazi invasion of Czechoslovakia. He recalls "seeing some greenish looking coupons" bearing the name of the insurance company: Victor Zum Berlin. Declaration of Alexander Weiss submitted with

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that even though the policy forbade direct suits, Louisiana had a legitimate interest in applying its law to protect the plaintiff. *Id.* at 68-73. This Court stated, "That [Due Process] principle is inapplicable to this case because, as we have just decided, Louisiana has a constitutional right to subject foreign liability insurance companies to the direct action provisions of its laws whether they consent or not." *Id.* at 73-74. If a state may compel an insurance company to defend litigation within the forum without its consent, it must follow that a state also has the lesser power to compel an insurance company that has chosen to conduct business within the forum to report on its, and its affiliates', activities.

[6] Many Holocaust survivors and beneficiaries have been residents and citizens of California, domiciled in California, for as long as half a century. Declaration of Rabbi A. Cooper ("Cooper Decl.") (J.A. at 25), ¶ 6 ("Many of those refugees eventually emigrated from Europe and settled in various places around the globe, including the United States."); Stern Decl. (J.A. at 29), ¶ 8 ("Based on my knowledge of the Jewish community of California I believe that there are over 22,000 Holocaust survivors living throughout the state.").

Holocaust Survivors/Insurance Claims – Questionnaire. (Excerpt of Record, No. 1 ("1-ER") at 448). After the invasion, the Nazis rounded up Alexander's entire family and imprisoned them in concentration camps. 1-ER at 446. Although Alexander, his mother and his sister survived the concentration camps, his father did not. 1-ER at 447. Alexander then moved to California, where he attempted to collect on the insurance policies that his father had purchased prior to the war. 1-ER at 446. But the insurance companies refused to release any information. 1-ER at 455; *see also* Lash Decl., ¶¶ 3, 9 ("Bet Tzedek has been involved in litigation efforts to secure insurance benefits for the Holocaust survivors who have been denied proceeds . . . and simply ignored.").

Finally, to the extent that the analogy has any merit, it supports Respondent's position. "Under the modern approach to choice of law, interest analysis, nothing is more significant to the question of which state's law should apply than the *domicile* of the parties." Jeffrey L. Rensberger, *Who Was Dick? Constitutional Limitations on State Choice of Law*, 1998 Utah L. Rev. 37, 44 (1998) (arguing that the plurality in *Allstate Ins. Co. v. Hague* created a legal fiction about the policyholder's domicile in *Home Ins. Co. v. Dick* in order to align *Dick* with modern choice of law but should have overruled *Dick* instead) (emphasis added). Indeed, this Court has recognized that *Dick* was an "extreme example[ ] of selection of forum law" because the contacts [of the policyholder] with the forum state were virtually non-existent. *Allstate Insurance Co. v. Hague*, 449 U.S. at 311 (refusing to apply *Dick*).

Allstate Insurance Co. v. Hague is particularly instructive in this regard. There, Mrs. Hague, the beneficiary of her deceased husband's automobile policy, filed her

lawsuit to recover on the policy in Minnesota. This Court held that Mrs. Hague's move from Wisconsin, where she lived with her husband at the time of his accident, to Minnesota constituted a contact with Minnesota that permitted Minnesota to apply its law. *Id.* at 319. This Court particularly noted that Mrs. Hague moved to Minnesota to marry and live with her new husband, a Minnesotan – *not* to take advantage of Minnesota's statute, which permitted uninsured motorist coverage to be stacked. This Court also noted that Mrs. Hague moved *before* she filed her lawsuit. Thus, because her "change of residence was bona fide and not motivated by litigation considerations," Mrs. Hague had not engaged in forum shopping. *Id.* at 319 and n.28.

Holocaust survivors and beneficiaries, of course, moved to California for reasons entirely unrelated to HVIRA. The California legislature could rightly presume that some moved to escape the Holocaust, Cooper Decl. (J.A. at 25), ¶ 6, and that others, who had suffered through and survived the Holocaust, came after the war hoping to reconnect with family living in California. The legislature also could presume yet other Holocaust survivors relocated to California with the desire to become, once again, part of an established Jewish community. All these beneficiaries shared a desire, evidenced by their move to California, to live in safety and security, in a land where the state would protect and support, rather than attack and kill, them. In all their briefing below and before this Court, Petitioners cite to no evidence that *any* beneficiary moved to

California to take advantage of HVIRA. Indeed, any such assertion is preposterous.[7]

For these reasons, Petitioners' citation to purported post-transaction change of residence cases has nothing to do with whether a state may enact laws partially or wholly intended to benefit persons who moved to the state after the events in question. Moreover, to the extent that the analogy is meaningful, *Allstate Insurance Co. v. Hague* reveals that it supports Respondent's position because Holocaust survivors and beneficiaries were not forum shopping when they determined to rebuild their lives in California.[8]

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[7] More than 13,972 Holocaust survivors already had moved to California by the time HVIRA was enacted. Stern Decl. (J.A. at 29), ¶ 3 ("In 1998 the Jewish Federation of Greater Los Angeles conducted a demographic survey. . . . That survey reveals that, as of July 1997, there are approximately 13,972 Holocaust survivors who live in Los Angeles. The number of survivors actually may be much greater, however since the definition[ ] of a 'Holocaust survivor' has been expanded by California law. . . . "). *See also* Cal. Ins. Code § 13801(d) (Deering 2003) ("At least 5,600 documented Holocaust survivors are living in California today.").

[8] Even where a post-transaction change of residence is motivated by forum shopping, application of the forum law does not necessarily violate Due Process. "[I]n a given case the danger of forum shopping . . . may be real, but it seems that *this factor has played a disproportionate and unwarranted role in refusing to consider the interplay of the various interest factors* which exist at time of trial [or when a statute is enacted]." Note, *Post Transaction or Occurrence Events in Conflict of Laws*, 69 Colum. L. Rev. 843, 851 (1969) (arguing that "interest theory logically demands that consideration be given to . . . post contract events in determining the proper choice of law") (emphasis added).

B. The Insurance Companies' Choice To Conduct Business In California Provides California Sufficient Contacts To Enact HVIRA.

HVIRA applies to all insurance companies "currently doing business" in California. Cal. Ins. Code § 13804(a) (Deering 2003). These business ties between California and the insurance companies who choose to conduct business in California are important contacts that give California an interest in supervising the companies' obligations insofar as they affect California and Californians. HVIRA is designed to protect Holocaust survivors, their descendents, and *all California residents doing business, or that may do business, with California insurance companies*. Cal. Ins. Code § 13801(f) (Deering 2003) (emphasis added).

Even the limited information that HVIRA has revealed to date teaches that at least two European insurance companies that sold Holocaust-era policies have longstanding ties to California. MONY Life Insurance Company (formerly The Mutual Life Insurance Company of New York), sold 6,149 policies to persons in Europe between 1920 and 1945, while it was licensed to do business in California. Respondent's Joint Appendix ("Resp. App.") at 36. Similarly, Generali Insurance Company, Ltd. of Trieste and Venice – a Petitioner here – has been licensed to do business in California since 1935. 1-ER at 873. These voluntary contacts with California negate any argument of unfair surprise or frustration of legitimate expectations as a result of California's choice of law. *Hague,* 449 U.S. at 317-318 n.24. By virtue of their presence in California, Petitioners can hardly claim "surprise that the state courts might apply forum law." *Id.* at 317. *See also Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 182 (1964) (holding

that an insurance company licensed to do business in the forum state must have known forum law would be applied).

Indeed, California insurance companies, including Petitioners, have been subject to California reporting statutes other than HVIRA while conducting business in California. Cal. Bus. & Prof. Code § 801(a) (Deering 2003) (requiring that "every insurer providing professional liability insurance to a person who holds a license . . . under any agency . . . shall send a complete report to that agency"); Cal. Ins. Code § 1215.4(g) (Deering 2003) (providing that "every person in an insurance holding company system subject to registration is required to provide the insurer with all information reasonably necessary to enable the insurer to comply with the provisions of this article"). Thus, not only must Petitioners have expected California reporting statutes such as HVIRA to apply to them, they actually have experienced the application of such statutes.

Amici Mitsubishi Materials Corporation, *et al.*, would have this Court believe that foreign insurers never anticipated any burden would attach to their choice to conduct business in California. *See* Motion of Mitsubishi Materials Corporation For Leave To File And Brief *Amici Curiae* In Support Of Petitioners at 21. But as this Court has recognized, the very nature of the insurance industry belies this contention. *Clay*, 377 U.S. at 182 (1964) ("Insurance companies, like other contractors, do not confine their contractual activities and obligations within state boundaries. They sell to customers who are promised protection in States far away from the place where the contract is made."). Indeed, some Holocaust-era insurance polices contain specific provisions contemplating worldwide coverage. For

example, one policy states: "After the Policy has been in effect for six months, it will also cover dangers of travel and changes of domicile outside Europe." Policy No. 55283, attached as Exhibit 1 to Kaplan Decl. (J.A. at 77), ¶ "*Travels.*" By including ambulatory coverage, an insurer must have anticipated the possibility that the law of other jurisdictions might apply. *Hague*, 449 U.S. at 319 n.24 (holding that continental coverage and lack of choice-of-law clauses created legitimate expectation that forum law would apply); *Clay*, 377 U.S. at 182 (holding that nation-wide coverage of policy and lack of choice-of-law clause created legitimate expectation that forum law would apply).

California has sufficient contacts to constitutionally enact HVIRA. The beneficiaries who live in California chose to rebuild their lives here after the war for reasons plainly unrelated to HVIRA. Moreover, Petitioners' choice to profit from conducting business in California negates any element of surprise or unfairness in enacting HVIRA.

III. HVIRA IS NOT OVERBROAD BUT IS RATIONALLY RELATED TO CALIFORNIA'S INTEREST IN MAKING PUBLIC LONG-CONCEALED AND IMPORTANT INSURANCE POLICY INFORMATION

Petitioners are simply wrong in suggesting that HVIRA's reporting requirements are so overbroad as to be unreasonably burdensome. *E.g.*, Petitioners' Brief at 17, 26, 36 (using language such as "onerous," "burdensome" and "voluminous"). As this Court has held:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought.

Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1955) (holding that a statute which forbade opticians to fit or duplicate lenses without a prescription from an ophthalmologist or optometrist was rational and valid under Due Process). Indeed, "'[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts.'" *Id.* (quoting *Munn v. Illinois*, 94 U.S. 113, 114 (1876)).

Petitioners do not dispute that the California legislature may enact laws that it "rationally could have believed" would promote legitimate state interests. *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648 (1981) (upholding retaliatory tax statute because California legislature could have believed the statute would promote its objective of influencing other states to drop their retaliatory taxes). Moreover, Petitioners have not demonstrated, and cannot, that HVIRA's requirements are any more burdensome than necessary to provide relevant information not only to beneficiaries and Holocaust survivors, but to all Californians. To restrict HVIRA's disclosure requirements would defeat the statute's purpose to make long-concealed and important insurance policy information available to all Californians, including Californian Holocaust victims. The information required under HVIRA is neither arbitrary nor irrational.

First, to limit disclosure only to policies that list policyholders or beneficiaries as California residents would be impossible because many policies would not on their face identify policyholders or beneficiaries as California residents – even though the individuals may

now be California residents, and may have been for many years.

Second, to limit disclosure to Holocaust victims would necessarily result in incomplete reporting because the insurance companies' files do not describe policyholders by race, religion or other characteristics that would identify them as victims. Cooper Decl. (J.A. at 26), ¶ 10; A Teachers Guide to the Holocaust, *Victims, at* http://fcit.coedu.usf.edu/holocaust/people/victims.htm (last visited March 15, 2003) (listing Jews, Gypsies, Poles, Slavs, dissenting clergy, political dissidents, disabled, Jehovah Witnesses, homosexuals, and others as Holocaust victims).

Third, to limit disclosure to only "unpaid" policies utterly defeats the purpose of HVIRA. Insurance companies disagree with survivor representatives and the California legislature over the meaning of the term "unpaid" policy. Many insurers, for instance, consider policies confiscated by the Nazis and policies paid into blocked accounts to have been "paid." Cooper Decl. (J.A. at 27), ¶ 12. If insurance companies were required to provide information on only those policies *they* consider "unpaid," they would prefilter the list to exclude policies that the California legislature and Holocaust survivors consider "unpaid." Cooper Decl. (J.A. at 27-28), ¶ 12.

Fourth, to limit disclosure to situations where the name of the insured identified by the claimant perfectly matches the name of the insured in the company's files would be impossible. The exact spelling of family names varies depending on the language used and how the name is translated or transliterated into English. Cooper Decl. (J.A. at 25-26), ¶ 9. Moreover, the exact name under which a family member may have sought a policy is likely to be impossible to know. By instead publishing a list of

information that includes the policyholders' addresses in addition to their names, as HVIRA requires, survivors and heirs might recognize their relatives' names.

Finally, whether HVIRA is burdensome to Petitioners is irrelevant. The rational basis analysis tests "the rationality of the government action *regardless of its impact.*" *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994) (upholding a Washington county law that created diking districts without first providing pre-taking compensation even though the dikes later contributed to residential flooding) (emphasis added). HVIRA need not be the least restrictive means to achieve its permissible end. *Scariano v. Justices of Sup. Ct. of Ind.*, 38 F.3d 920 (7th Cir. 1994) (upholding Indiana law that Sup. Ct. of Ind. out-of-state practitioners from the bar examination if they practice predominately in Indiana for a period of five years); *Hoffman v. United States*, 767 F.2d 1431, 1437 n.7 (9th Cir. 1985) (upholding California law that limited noneconomic damages in medical malpractice suits). State regulations much more intrusive and costly to private businesses than HVIRA's reporting requirements routinely have been upheld under the rational basis test. *See e.g.*, *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974) (holding that cost burden on banks to comply with record-keeping requirements of Bank Secrecy Act did not deprive banks of due process of law); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding state prohibition on sale of milk in plastic, nonreturnable, nonrefillable containers); *United States v. Carolene Products Co.*, 304 U.S. 144 (1937) (upholding Congressional prohibition on sale of "filled milk" in interstate commerce); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1948)

(discussing state legislature's broad power to enact business and industrial regulations).

Petitioners' suggestion that HVIRA fails the rational basis test because it is overbroad, burdensome and fails to use the least restrictive means are all legally irrelevant. HVIRA need only be drafted to achieve its legitimate purpose – to obtain insurance policy information – and there is no question that HVIRA accomplishes this.

CONCLUSION

For the forgoing reasons, as well as those stated in the Respondent's Brief, it is respectfully submitted that this Court should affirm the determination below.

Respectfully submitted,

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March 26, 2003

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